IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1285

MARK CHARLES FLOYD,

Appellant,

vs.

STATE OF ARIZONA,

Appellee.

Appeal from the
Supreme Court of Arizona

MOTION TO DISMISS APPEAL

ROBERT K. CORBIN
The Attorney General

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I N D E X

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MOTION TO DISMISS APPEAL

Comes now Appellee, the State of Arizona, and moves this Court pursuant to Rule 16 to dismiss the appeal for failure to present a substantial federal question. Reasons therefore are set out in the argument which follows.

ARGUMENT

I

THE STATUTORY SYSTEM OF VARYING PUNISHMENTS FOR DRUG OFFENDERS OF WHICH APPELLANT COMPLAINS RESTS ON A RATIONAL BASIS, SO HIS SENTENCE IS IMMUNE TO CONSTITUTIONAL SEARCH.

Appellant contends that the State of Arizona may not classify hashish as a narcotic, and punish him for its possession accordingly, while marijuana per se is punished less severely. This is clearly incorrect. That the police power of the state is broad enough to encompass the regulation of dangerous drugs has long been recognized by this Court. See, e.g., Minnesota ex rel. Whipple v. Martinson, 256 U.S. 41(1921). Moreover, the overwhelming weight of judicial authority holds that marijuana itself may properly be statutorily classified as a narcotic, even though the scientific basis for such classification may be questionable. See Annot., "Drugs

of Vegetable Origin as Narcotics", 50 A.L.R.3d 1164 and Supp. Appellant is therefore forced to argue that there is no significant difference between hashish and marijuana, and hence no legitimate basis for punishing more severely for possession of hashish.

Appellant's argument that there is no real difference between hashish and marijuana is based upon expert testimony that the active element in both is the same, referred to as THC. (Jurisdictional Statement at 8). However, hashish and marijuana do not "merely differ in physical appearance." (Id. at 9). Hashish is the resin obtained from the marijuana plant. (R.P. Oct. 6, 1977 at 12-13, 23, 42, 47-48). It therefore is physically different from marijuana in that it is not composed of the bulky vegetable matter which comprises marijuana. (Id. at 49). Appellant's own expert conceded that although there are wide

variations (because THC is more concentrated in some parts of the marijuana plant than others), hashish usually contains more THC than does marijuana. (Id. at 24). This was also the conclusion of the state's expert (Id. at 52,59), and it is a fact that has been judicially recognized before. The Ninth Circuit noted expert testimony defining hashish as "a form of marihuana which contains a greater portion of the active ingredient THC, than does the normal plant." United States v. Kelly, 527 F.2d 961, 962(1976). For this reason, hashish is generally considerably more potent in its psycho-active effects than ordinary leafy marijuana. (R.P. Oct. 6, 1977 at 25). A typical dose of hashish is only 1/40 of a gram. United States v. Kelly, supra. Instead of requiring an entire cigarette of contraband, as marijuana use does,

in hashish use a "very small line of it on a pin can be drawn down the outside of a cigarette. As that is smoked the oil is volatilized, the THC is inhaled." (R.P. Oct. 6, 1977 at 48).

In sum, hashish is physically much more compact than marijuana, and usually is more potent in its ability to alter the user's mind because it is purer THC. These factors provide sufficient reasons for applying stricter regulation to hashish by way of harsher penalties. Alcohol is the active ingredient in both hard liquor and beer, but its concentration in liquor creates a much higher potential for abuse, so liquor has historically been regulated much more intensely than beer. The same rationale applies here. Moreover, even in its most concentrated form, alcohol is relatively bulky and

easily detected. Hashish, however, is extremely compact, making its regulation, detection, and seizure much more difficult than enforcement of the laws against marijuana. These are clearly legitimate, rational distinctions upon which the heavier penalties for hashish possession could properly be based.

This Court, in upholding New York's innovative approach to drug control, through prescription registration, recently reiterated the view that "[I]ndividual States have broad latitude in experimenting with possible solutions to problems of vital local concern." Whalen v. Roe, ____U.S._____, 97 S.Ct. 869, at 875(1977). The Court then went on to hold that a state's "vital interest in controlling the distribution of dangerous drugs" was enough to make the experiment a "reasonable exercise of New York's broad police powers." Id. at 876. This

necessarily follows from a strong line of cases defining the application of the Equal Protection Clause to legislatively-drawn distinctions.

> "Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious." McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

> "Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons

totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. See McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093(1947); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911)."
McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802, 808-809(1969).

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause

> merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369, quoted in Morey v. Doud, 354 U.S. 457, 463-464 (1957).

While the precise verbiage varies, these tests all amount to essentially the same thing--if there is a rational basis for the distinction applied, it will be upheld. There clearly is a rational basis for the Arizona legislative scheme which varies the penalty applicable according to the concentration of THC in the contraband. That this is a wholly appropriate approach is demonstrated

by the cases upholding the linking of penalties to the amount of drug mixture possessed. A number of states have enacted statutes creating penalties which are progressively more severe according to the weight of the compound containing illicit drugs possessed by the defendant. Such statutes have sometimes been attacked as violating the Equal Protection Clause because a person possessing, for example, 10 ounces of a compound containing only one ounce of pure heroin would be subject to a harsher penalty than a person possessing two ounces of straight heroin. The statutes have nonetheless been upheld because they rested on a rational basis. See, e.g., People v. Mayberry, 63 Ill.2d 1, 345 N.E.2d 97 (1976); People v. Solarzano, 84 Cal.App.3d, 148 Cal.Rptr. 696(1978); United States ex rel. Daneff v. Henderson, 501 F.2d 1180 (2d Cir. 1974). The Daneff case is especially instructive here.

After quoting this Court's statement in Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937) that "The comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for [the state's] determination", the Court of Appeals stated,

> "The State cannot be expected to make gradations and differentiations and draw distinctions and degrees so fine as to treat all violators with the precision of a computer. . . "
> 501 F.2d at 1184.

In other words, a state constitutionally need not tailor its penalties depending upon the purity of the active element in the contraband. Arizona has taken that extra step, a step which, if anything, increases the fairness of the statutory scheme rather than detracting from it. The gravity of the drug problem in Arizona is a matter of common knowledge, and certainly is as much a "problem of vital

local concern"in Arizona as similar problems were in New York. Whalen v. Roe, supra. The Arizona legislature has enacted an enlightened, thoroughly reasonable statutory scheme for dealing with the problem. The statute is inoffensive to the Constitution, and should therefore be upheld.

CONCLUSION

Appellant has failed to show any basis for his claim that the Arizona drug statutes deny him equal protection of the laws. A substantial federal question being completely lacking, this Court should dismiss the appeal.

Respectfully submitted,

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Bruce M. Ferg

BRUCE M. FERG
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AFFIDAVIT

STATE OF ARIZONA)
)ss.
County of Pima)

BRUCE M. FERG being first duly sworn upon oath, deposes and says:

That two copies of Appellee's Motion to Dismiss Appeal were mailed, first class postage prepaid, this date to:

Arthur M. Berman
120 W. Madison St.
Room 600
Chicago, Illinois 60602

Further affiant sayeth not.

Bruce M. Ferg
BRUCE M. FERG

SUBSCRIBED AND SWORN to before me this 22 day of February, 1979.

Patricia A. Kleen
Notary Public

My Commission Expires:
3/6/81